IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 643 OF 2004

Union of India through the
Deputy Commissioner of Customs ... Applicant

versus

1. Vijay Narayan Shetty,
2. Narayan Krishnayya Shetty,
3. State of Maharashtra ... Respondents

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Mr. H.V. Mehta, for the Applicant.
Mr. Prakash Shetty, for Respondents Nos. 1 and 2.
Mr. A.S. Gadkari, A.P.P., for Respondent No. 3.

...

CORAM : A.M.KHANWILKAR,J.

23rd December 2004

P.C.:

. Heard Counsel for the parties. This application takes exception to the bail order passed by the Sessions Judge, Raigad at Alibag dated 4th December 2003 enlarging the Respondents Nos. 1 and 2 on bail in relation to offence punishable under sections 8C, 20 read with

section 27 of the N.D.P.S.Act. The prosecution case is that the contraband item weighing about 9.900 Kgs. (heroin) was recovered from the store room situated in the premises in which the Respondents were conducting the hotel business. According to the prosecution, the Respondents had full knowledge about the storage of contraband item which was seized from the store room. However, the Respondents' plea appears to be that the same belonged to Hasan Patel and Swapnil, both residents of Taloja and that the said persons were dealing in drugs. The fact remains that the contraband item of commercial quantity has been seized from the premises, which were in possession of the Respondents. The prosecution case will have to be accepted for the time being that the said Respondents had knowledge about the fact that the item was contraband item and stored in the premises in their use. With this material on record, I see no basis how the Court below could have enlarged the said Respondents on bail inspite of the mandate of section 37 of the Act. Section 37 of the Act postulates that no person involved in the offence under the said Act should be released on bail unless there is reason to believe that the person is not guilty of the

alleged offence. The fact that the said Respondents had knowledge about the contraband item and its storage in the premises in their use would make them liable for the offence. Assuming that the contraband was owned by one Hasan Patel and Swapnil and those persons were dealing in contraband in the said premises in question of which the said Respondents had knowledge they will be liable for offence of abetment for which they have been charged by the prosecution. The argument that the Respondents were in jail for more than three months and the principal offender not having been arrested, cannot be the basis to enlarge the person involved in the offence under the N.D.P.S.Act on bail, unless the mandate of section 37 is fulfilled. Whereas the Court below for enlarging the Respondents on bail proceeded on untenable reasoning as can be discerned from para 7, which reads thus :

> "Even though there is no agreement in writing the Applicants have fairly admitted that they were caretaker of the Restaurant and hence they were present. Since the date of arrest of the applicants, no progress has been made by the cell. Further, the documents failed connect the applicants with the seized property, which was found near store room except their presence as caretaker at the

> Restaurant. No specific allegations connecting the applicants with the seized property are made. Even though the officers are aware as to whereabouts of the owner of Hotel and the person carrying on the business of drug trafficking have not been arrested for almost two months. Under the circumstances, I am inclined to grant the bail to the applicants."

None of these aspects can be the basis to conclude that there are reasons to believe that the Respondents are not guilty of the alleged offence. If it is so, the order as passed by the Court below cannot be sustained being in excess of jurisdiction. I am conscious of the fact that the bail order has been granted by the lower Court, which has operated in favour of the Respondents since December 2003, but that cannot be the basis to overlook the mandate of section 37 of the Act. Accordingly, this application succeeds. The order passed by the Court below is set aside and the Respondents are directed to be taken into custody forthwith.

. At this stage, Mr. Shetty prays for time to surrender. Three weeks’ time to surrender as prayed for is granted.

. Parties to act on the authenticated copy of this order.

(A.M.KHANWILKAR,J.)